

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM F. MATHIS and U.S. POSTAL SERVICE,
POST OFFICE, Orlando, Fla.

*Docket No. 97-1303; Submitted on the Record;
Issued January 27, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 13, 1996 on the grounds that he refused an offer of suitable work; and (2) whether the Office's refusal to reopen the record pursuant to appellant's request for reconsideration under section 8128(a) of the Federal Employees' Compensation Act constituted an abuse of discretion.

On December 11, 1976 appellant, then a 48-year-old mail handler, filed a notice of traumatic injury and claim, alleging that he injured his spinal cord while lifting a heavy sack of mail on December 10, 1976. The Office accepted appellant's claim for lumbosacral strain and ruptured disc at the L5 to S1 level. In a decision dated December 11, 1979, the Office terminated appellant's compensation on the grounds that the medical evidence established that he had recovered from the accepted conditions and any continuing disability was due to preexisting conditions. By decision dated February 20, 1980, the Office denied merit review of its December 11, 1979 decision on the grounds that the evidence submitted was cumulative and not sufficient to warrant review. In a decision dated March 19, 1980, the Office vacated the prior decisions terminating compensation and reinstated appellant's compensation benefits. Appellant received appropriate compensation for temporary total disability.

In a letter dated October 5, 1994, the employing establishment offered appellant a limited-duty position as a modified clerk, requiring intermittent sitting for five hours a day, intermittent lifting, walking, kneeling and standing for one hour a day, a weight limitation of zero to ten pounds and no bending, squatting, climbing, twisting or driving heavy vehicles. This position initially was approved by appellant's treating physician and a Board-certified orthopedic surgeon, Dr. Donald E. Pearson and was accepted by appellant. However, he did not return to work. By letter dated May 10, 1996, the Office contacted Dr. Pearson and requested information as to whether appellant was still capable of returning to work in the offered modified clerk position. In a letter dated June 6, 1996, the Office advised appellant that the offered position was suitable and within his work capabilities and notified appellant that if he refused the position

without reasonable cause, his compensation could be terminated pursuant to 5 U.S.C. § 8106(c) of the Act. The Office allowed appellant 30 days to provide an explanation if he refused the offer. Appellant refused the offer based on the advice of his treating physician, Dr. Pearson. After further development of the evidence, in a letter dated September 20, 1996, the Office advised appellant that he had 15 days to accept the modified clerk position, finding that his reason for refusing the position was not acceptable as an impartial medical examiner had confirmed that the position was medically suitable. By decision dated October 10, 1996, the Office terminated appellant's compensation effective October 13, 1996 on the grounds that he refused an offer of suitable work. In a decision dated December 12, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and immaterial and therefore was not sufficient to warrant merit review.

The Board finds that the Office properly terminated appellant's compensation effective October 13, 1996.

Under the Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.³

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁴ However, to justify such termination, the Office must show that the work offered is suitable.⁵ An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.⁶

In the present case, the initial issue to be resolved is whether the position offered was suitable within the meaning of the Act and regulations. The regulations governing the Act provide several steps that must be followed prior to the determination that the position offered is suitable. The Office properly requested information from appellant's treating physician concerning whether appellant would be capable of performing the duties of a modified clerk as set forth in the October 1994 job offer. In a report dated May 30, 1996, Dr. Pearson indicated that appellant could not perform the duties of a modified clerk and that he should continue to receive compensation for total disability. Earlier, appellant had been referred to an Office referral physician, Dr. J. Darrell Shea, a Board-certified orthopedic surgeon, for a second opinion

¹ 5 U.S.C. § 8101 *et seq.*

² *William A. Kandel*, 43 ECAB 1011 (1992).

³ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

⁶ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

and examination. In a report dated April 8, 1996, which was an addendum to his initial report dated January 11, 1996, Dr. Shea indicated that appellant could perform the duties of a modified clerk as set forth in the October 1994 job offer.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷ As there was a conflict in the medical evidence between the reports by Drs. Pearson and Shea, the Office properly declared a conflict and referred this case to Dr. Robert S. Roberts, a Board-certified orthopedic surgeon, for an impartial medical examination and report. The Board has carefully reviewed the opinion of Dr. Roberts and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight. In a report dated August 22, 1996, Dr. Roberts reviewed the medical evidence of record and examined appellant and diagnosed lumbar spondylosis, post laminectomy for disc herniation and multiple soft tissue tumors. He noted that appellant had physically disabling residuals of his L5 to S1 herniated discs which caused physical limitations, but indicated that appellant was capable of sedentary work and could specifically work in the modified clerk position outlined in the October 5, 1995 job offer. Dr. Roberts expressed reservations concerning appellant's motivation to work after not doing so for 20 years. As Dr. Roberts reported that appellant could work in the specified limited-duty position and that there was no objective evidence to suggest that he could not function in this position, the Office properly determined that the position was suitable work. Consequently, the Office permissibly terminated appellant's compensation based on his refusal of the position.

The Board also finds that the Office's denial of appellant's request for reconsideration and refusal to reopen the record was proper.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

⁷ *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

⁸ 20 C.F.R. § 10.138(b)(2).

⁹ *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

¹⁰ *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

On reconsideration, appellant submitted a letter reiterating his disagreement with the Office's October 10, 1996 decision and resubmitted the August 22, 1996 report by Dr. Roberts, alleging that the Office had not properly reviewed the physician's report. As appellant has not presented any points of law or fact to allege error, did not submit any new evidence to demonstrate that the determination of the Office was erroneous and since the report by Dr. Roberts was thoroughly reviewed by the Office in its October 1996 decision, he has not submitted any evidence which is sufficient to warrant reopening the record for merit review. The Office did not abuse its discretion in denying appellant's request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated December 12 and October 10, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 27, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member